IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 901 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAMJIBHAI LAHANUBHAI KUNKA & 5 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR.J.A.DAVE FOR MR.P.R.NANAVATI LEARNED ADVOCATE for Appellants No.1-6.
MR.P.M.PRACHCHAK, ADDL.PUBLIC PROSECUTOR for Opponent

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 12/07/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

The appellants came to be tried by the learned Additional Sessions Judge, Valsad at Navsari in Sessions Case No.66 of 1992 and came to be convicted for offences punishable under Section 302 read with Sections 143, 147 and 148 of the Indian Penal Code and under Section 323 read with Sections 143, 147 and 148 of the Indian Penal Code, by judgment and order dated 31st August, 1998. Appellant No.1 was ordered to undergo rigorous imprisonment for life and to pay a fine of Rs.1,000/-, in default, to undergo rigorous imprisonment for nine months. Whereas, appellants No.2 to 6 were sentenced to undergo life imprisonment and to pay fine of Rs.500/-, in default, to undergo rigorous imprisonment for six months for the offence of murder. All the appellants were ordered to undergo rigorous imprisonment for period of three months and six months for offence punishable under Sections 143, 137 and 148 of the Indian Penal Code respectively. Appellants No.1 to 5 were ordered to undergo rigorous imprisonment for six months and to pay fine of Rs.200/-, in default, to undergo rigorous imprisonment for two months for the offence of hurt. Whereas, appellant No.6 was ordered to undergo rigorous imprisonment for three months and to pay a fine of Rs.200/-, in default, to undergo further rigorous imprisonment for a period of one month. All the

sentences were ordered to run concurrently. Benefit of set of was also given to them.

2. The case of the prosecution is that the appellants constituted an unlawful assembly and in furtherance of the common object caused murder of deceased, Chintuben Lilubhai Pavar and caused grievous hurt to Rasuben Ratanbhai and hurt to Lilubhai Dhakalbhai and Ratanbhai Dhakalbhai, in an incident that occurred at about 24:00 hours on 16th April, 1992 at village Madhuban of Valsad District near the house of the victims. It is also alleged that in commission of the crime, the appellants used sticks, wooden log and cycle chain. As per the prosecution case, the appellants firstly assaulted Lilu Dhakal and Rasu Ratan and when Rasu Ratan, Ratan Dhakal and deceased-Chintuben intervened, they caused injury to them also with the weapons. Chintuben sustained an injury on head which ultimately resulted into her death, which is allegedly caused by appellant No.1. The F.I.R. was lodged and offence was registered. Upon investigation, having found sufficient material against the accused-appellants, the Investigating Agency filed charge-sheet against the accused-appellants in Court of learned Judicial Magistrate First Class, Dharampur. Learned J.M.F.C., in turn, committed the case

to the Court of Sessions, as the offences were triable exclusively by the Court of Sessions and Sessions Case No.66 of 1992 came to be registered.

2.1 Charge against the accused-appellants came to be framed at Exh.2 and the appellants pleaded not guilty to the charge. They came to be tried by the Sessions Court and the Sessions Court upon appreciation of evidence led by the prosecution came to a conclusion that the prosecution was successful in establishing charges against the accused-appellants and recorded conviction as stated above. Being aggrieved by the said conviction, the appellants have preferred this appeal.

3. Learned Advocate, Mr.J.A.Dave, appearing for Mr.P.R.Nanavati, has taken us through the record and proceedings. He submitted that the incident occurred at about 24:00 hours on 16th April, 1992. The location is such that the eye-witnesses could not have seen the incident, as there was no light and therefore, version given by the eye-witnesses ought not to have been accepted by the trial Court. He submitted that this aspect would raise question as to identity of the appellants and their respective role. Mr.Dave, also contended that the prosecution has not been able to bring

on the record the genesis of the incident and whatever is brought in this regard is doubtful. Mr.Dave, also submitted that the prosecution has not examined any independent witnesses. Material witnesses are all interested witnesses who are either injured or who are related to the deceased. Mr.Dave, submitted that the manner in which the incident is alleged to have occurred and the place of incident, if seen, would clearly indicate that the incident could not have occurred in the manner it is alleged. The F.I.R. is lodged late by 20 hours. The first informant though an injured eye-witness has taken no action for about 20 hours which speaks volumes about the conduct of the witnesses.

3.1 Mr.Dave, submitted that all these factors taken collectively, the evidence of the prosecution is not reliable. It is the case of the prosecution itself that the parties were on inimical terms on account of political rivalry and therefore benefit of doubt ought to have been given to the appellants and they ought to have been acquitted. He, therefore, submitted that the appeal may be accepted.

3.2 By way of alternative submission, learned Advocate, Mr.Dave, submitted that even, if the

prosecution case is accepted as it is, by not stretch of imagination can it be said that unlawful assembly had a common object of murdering deceased-Chintuben. All that emerges from prosecution evidence is that the appellants collectively went to the place of Lilu Dhakal and, then the incident occurred. They were armed with weapons and they have political rivalry as a motive. The common object therefore can at the most be of rebuking Lilu Dhakal and / or at the most committing an assault on them but not murder in any event. Even, so far as injury to deceased is concerned, there is only one blow on head which has resulted into her death. The blow has not caused external serious injury and therefore, the case cannot fall within the definition of murder. At the most, it can be culpable homicidal not amounting to murder and, therefore, the Court may after appreciating the evidence, alter the conviction and inflict the lesser punishment.

4. Learned A.P.P., has opposed this appeal. According to him, all the appellants went to the house of Lilu Dhakal, they are all armed with one weapon or the other. They have all actively participated in the incident and their involvement is reflected from the deposition of injured eye-witnesses. The trial Court

has, therefore, rightly recorded conviction of the appellants and this Court may not interfere with the judgment and order impugned in the appeal. Mr.Prachchak, rely on a decision reported in ***2004 (7) SCC 629*** and submitted that the liberty of all the assailants would be collective and constructive. Here, is a case where all of them have actively participated in the incident and, therefore, as member of unlawful assembly they all have been rightly convicted by the trial Court. Appeal, therefore, may be dismissed.

4.1 Learned A.P.P. has drawn our attention to the report from prison authorities that appellants No.2, 3, 5 and 6 viz. Rameshbhai Ramjibhai, Chhotubhai Malyabhai, Litiyabhai Janubhai and Kakalbhai Mangalbhai respectively have absconded from different dates from the custody while they were on furlough or on temporary bail. Mr.Prachchak, submitted therefore, that appropriate action has been taken by the prison authorities in this regard.

5. We have taken into consideration rival side contentions.

6. The prosecution has examined Laksibhai Bilubhai

at Exh.24, Barkubhai Ratanbhai at Exh.26, Dhakalbhai Lilubhai at Exh.27, Saguniben Lilubhai at Exh.28, Ratanbhai Dhakal at Exh.35, Lilubhai Dhakalbhai at Exh.36 and Rasuben Ratanbhai at Exh.37 as eye-witnesses to the incident. Out of these seven eye-witnesses, Lilubhai Dhakalbhai, Ratanbhai Dhakalbhai and Rasuben Ratanbhai have sustained injuries in the incident. Their injuries were examined by Dr.D.N.Patel, who is examined at Exh.29. Said doctor had performed postmortem also and he has deposed about the injuries sustained by the witnesses and the injuries found on person of the deceased.

7. The version of the eye-witnesses is found to be consistent with each other and they all implicate the appellants. They all deposed that the appellants came together and challenged the complainant side to come out of the house. At that time, Ratanbhai Dhakalbhai was sitting outside his house and he was assaulted upon by accused-appellant No.1-Ramjibhai giving a stick blow on back, accused-appellant No.3, Chhotubhai committed assault with a chain and therefore, witnesses Laksibhai, Rasuben, Lilubhai and Ratanbhai all rushed to his rescue. The appellants however caused injuries to the witnesses with their respective weapons in the transaction. Chintuben received an injury on her forehead besides

other injuries and fell down. The assailants/appellants therefore, ran away. As per the first informant-Laksibhai, he went to the Police Station on next day morning. However, it appears that the F.I.R. was recorded much later in the day on the next day. It appears that after the incident occurred around midnight, no action was taken by the complainant side. But the next day, Sarpanch was informed, who in turn, informed the Police and the Police arrived and recorded the first information from Laksibhai.

7.1 The cross-examination is mainly on topography of the place of incident. Some questions are put to witnesses to show that as Rasuben and Chintuben while trying to rescue Ratanbhai fell on him with their face down only with a view to show that head injury sustained by the deceased could not have been caused in that transaction. However, it emerges from evidence of the eye-witnesses as well as injured witnesses that the deceased received injury before she fell. No material substance comes out of the cross-examination of the witnesses and nothing turns favourable to the appellants.

7.2 In our opinion, the evidence of the witnesses is consistent and good enough to show involvement of the

appellants in the incident and we agree to that finding of the trial Court.

8. However, from what emerges from the evidence, it is difficult for us to confirm a finding that, the appellants had a common object of murdering deceased-Chintuben. The appellants have arrived at the place collectively, they were armed with weapons like sticks, chain, wooden log and stones, they had some grievance against the complainant side on account of the election of Sarpanch. From the manner in which the incident had started *(all assaulting Ratanbhai with stick when he was sitting outside the house and gave stick blow on his back)* would indicate that their common object at the most could have been of giving thrashing to the complainant side or else they would have cased more serious injuries to Ratanbhai who was unarmed and readily available as a soft target, but the injuries were caused on back, which is non-vital part of the body. The injury is also not of a serious nature. We are, therefore, of the view that the unlawful assembly of the appellants could not have shared a common object of committing a murder, least that of deceased-Chintuben who comes into picture by coincident. She her own volition, intervenes in the assault and in the transaction receives injury on her

forehead which proves to be fatal to her. In our opinion, therefore, conviction under Section 302 read with Sections 143, 147 and 148 of the Indian Penal Code could not have been recorded. We are unable to confirm the same.

9. Deceased-Chintuben came to the spot by coincident and suddenly she received stick blow on her forehead which was inflicted to her by appellant No.1-Ramjibhai Lahunabhai, who was in the process of committing assault on witness-Ratanbhai. This is a solitary injury which is attributed to Ramjibhai so far as injury to deceased is concerned. If we see the postmortem notes (Exh.33) we notice that there is a haematoma of the size of 3cm x 2cm on left forehead noticed by the doctor. The other injuries are in form of swelling on left cheek, redness of left eye, bruise on the middle of the left thigh and bruise on back region. There is a linear fracture of left frontal bone corresponding to external injury on forehead and the cause of death is coma due to injuries on the vital organ viz. brain. Postmortem notes indicate that there was subdural haematoma on the left frontal lobe of the brain and the brain was congested and soft. In our opinion, the injury caused by appellant No.1 is only one in

number, but is inflicted on vital part of the body with a stick, sufficient to cause fracture on the skull and therefore, if not intension, knowledge on part of the appellant No.1 can safely be inferred in facts and circumstances of the case. We are, therefore, of the opinion that it would be a case of culpable homicidal not amounting to murder rather than murder.

9.1.1 The other accused persons cannot be held responsible for this act of appellant No.1 because, they did not share common object of causing murder of deceased-Chintuben nor can they be attributed any knowledge, that act of appellant No.1 would in all probability cause death of deceased-Chintuben.

9.2 Conviction of appellant No.1, therefore, will have to be altered from one under Section 302 read with Sections 143, 147 and 148 of the Indian Penal Code to one punishable under sections 304 Part - II of the Indian Penal Code.

10. So far as incident is concerned, it has resulted into hurt sustained by Lilubhai Dhakalbhai and Ratanbhai Dhakalbhai. The medical evidence shows that Lilubhai Dhakalbhai sustained three abrasions, one of

which had swelling over it and there was a complain of pain. Ratanbhai Dhakalbhai had sustained one C.L.W., two bruise and one abrasion. These injuries are simple in nature.

10.1.1 Rasuben Ratanbhai had sustained two C.L.Ws., one of which is muscle deep, one abrasion and there is loss of a tooth. This loss of tooth is attributed to accused-appellant No.2-Rameshbhai by Rasuben herself. Loss of tooth would fall within the definition of grievous hurt and, therefore, it can be said that grievous hurt was caused to Rasuben by accused No.2-Rameshbhai.

10.2 The picture that emerges therefore is that all the appellants, they went to the place of incident together, they all were armed, they had grievance against the complainant side and, from their conduct it is clear that, they wanted to assault the complainant side, therefore that was their common object. They all have participated actively and have collectively committed the assault. Obviously, they all would be vicariously responsible for the act of Rameshbhai, accused-appellant No.2. In the result, all the appellants would stand convicted for offences punishable under Section 323 read

with Sections 143, 147 and 148 of the Indian Penal Code and under Section 326 read with Sections 143, 147 and 148 of the Indian Penal Code for causing hurt and / or grievous hurt to witnesses, Lilubhai Dhakalbhai, Ratanbhai Dhakalbhai and Rasuben Ratanbhai. The conviction, therefore, will have to be altered accordingly.

10.3 Appeal stands partly allowed. Conviction of all the appellants under Section 302 read with Sections 143, 147 and 148 of the Indian Penal Code is set aside.

10.4 Appellant No.1-Ramjibhai Lahanubhai Kunka is convicted for offence punishable under Section 304 Part-II. He is sentenced to undergo rigorous imprisonment for the period of imprisonment already undergone by him. He is also convicted for the offences punishable under Section 323 read with Sections 143, 147 and 148 of the Indian Penal Code and is punished to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs.500/-, in default, to undergo simple imprisonment for a period of three months. He is also convicted for the offences punishable under Section 326 read with Sections 143, 147 and 148 of the Indian Penal Code and is punished to undergo rigorous imprisonment for a period of

three years and to pay a fine of Rs.1,000/-, in default, to undergo further imprisonment for a period of six months.

10.5 Rest of the appellants (Appellant Nos.2 to 6) are convicted for the offence punishable under Sections 326 read with Sections 143, 147 and 148 of the Indian Penal Code and are sentenced to undergo rigorous imprisonment for a period of three years. They all shall pay fine of Rs.1,000/- each, in default, to undergo further imprisonment for a period of six months.

10.6 Conviction and sentence of rest of the appellants (Appellants No.2 to 6) for the offence punishable under Section 323 read with Sections 143, 147 and 148 of the Indian Penal Code is confirmed. All the sentences shall run concurrently.

(A.L.DAVE, J.)

(BANKIM N. MEHTA, J.)

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